

**UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MAINE**

MAINE INDEPENDENT COLLEGES  
ASSOCIATION, MAINE PRESS  
ASSOCIATION, NETCHOICE, and REED  
ELSEVIER INC.,

Plaintiffs,

v.

GOVERNOR JOHN E. BALDACCI and  
ATTORNEY GENERAL JANET T. MILLS,  
in Their Official and Individual Capacities, and  
JOHN DOE,

Defendants.

CIVIL ACTION NO.: 09-cv-00396-JAW

**STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR A PRELIMINARY INJUNCTION**

The state defendants, the Governor and the Attorney General, oppose plaintiffs' motion for a preliminary injunction. In deciding whether to issue an injunction, the Court must consider four factors:

- (1) the movant's probability of success on the merits,
- (2) the likelihood of irreparable harm absent preliminary injunctive relief,
- (3) a comparison between the harm to the movant if no injunction issues and the harm to the objectors if one does issue, and
- (4) how the granting or denial of an injunction will affect the public interest.

*New Comm Wireless Services, Inc. v. Sprintcom, Inc.*, 287 F.3d 1, 8-9 (1st Cir. 2002); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). "The *sine qua non* of this four-part inquiry is likelihood of success on the merits: if the moving party cannot

demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” *New Comm Wireless Services*, 287 F.3d at 9; *see also Ross-Simons*, 102 F.3d at 16; *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993).

Here, plaintiffs cannot establish a likelihood of success because, as is set forth in the state defendants’ Motion to Dismiss filed this day, the plaintiffs have failed to present a justiciable controversy and, in any event, sovereign immunity bars the lawsuit. *See* Motion to Dismiss (Docket Item 13). Further, plaintiffs have not met the second criterion – demonstrating that they will suffer irreparable harm if injunctive relief is not granted. As is stated in the Motion to Dismiss, the Attorney General has stated that she will not be enforcing Chapter 230. *Id.* at 1, 3. Thus, plaintiffs face no risk of harm whatsoever from the state defendants, so there is no basis for enjoining the state defendants. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (“In suits such as this one, which the plaintiff intends as a ‘first strike’ to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury.”).

While plaintiffs also seek to enjoin a mythical “John Doe” from enforcing Chapter 230’s private cause of action, plaintiffs have not established that such a person actually exists and have thus not demonstrated that they are at risk from private lawsuits. Moreover, even if plaintiffs were able to identify such persons and show that they were at risk from such suits, an injunction against John Doe in this case would have no binding effect on persons who are not parties. *See Nova Health Systems v. Gandy*, 416 F.3d 1149, 1158-59 (10<sup>th</sup> Cir. 2005); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (per curiam); *Salvation Army v. New Jersey Department of*

*Community Affairs*, 919 F.2d 183, 193 (3d Cir. 1990).<sup>1</sup> Thus, an injunction against John Doe would not prevent the filing of private lawsuits by persons other than John Doe.

Accordingly, the state defendants respectfully request that plaintiffs' motion for a preliminary injunction be denied.

DATED: September 3, 2009

Respectfully submitted,

JANET T. MILLS

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/s/ Christopher C. Taub

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<sup>1</sup> These cases are discussed in the state defendants' Motion to Dismiss, at 10-13.

### **CERTIFICATE OF SERVICE**

I hereby certify that on this, the 3<sup>rd</sup> day of September, 2009, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

- **JAMES T. KILBRETH**  
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To my knowledge, there are no non-registered parties or attorneys participating in this case.

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